

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,886

75

GEORGE J. HURLEY, APPELLANT

v.

GEORGE J. REED, CHAIRMAN, UNITED STATES BOARD OF
PAROLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

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CLERK

QUESTION PRESENTED

Whether a prisoner, who is confined within the territorial jurisdiction of the District Court for the Middle District of Pennsylvania, under an order revoking his parole, may test the legality of his confinement by an action against the United States Board of Parole in the District of Columbia, when a petition for habeas corpus will lie in the District Court in Pennsylvania.



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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellant was committed to the custody of the Attorney General pursuant to the provisions of 18 U.S.C. 5010 (b) (the Federal Youth Corrections Act) on March 22, 1955, having pleaded guilty to a violation of 18 U.S.C. 876 (mailing threatening communications). He was released on parole on October 2, 1956, and was subsequently arrested on a parole violator's warrant executed June 22, 1959. On September 8, 1959 his parole was revoked after the usual hearing conducted by an examiner of the Board of Parole. Appellant was, at the time of the filing of this complaint, and still is, incarcerated in the United States Penitentiary, Lewisburg, Pennsylvania.

On January 21, 1960, appellant filed a complaint under 28 U.S.C. 2201 (Declaratory Judgment Act) in the District

Court for the District of Columbia seeking a review of the revocation of his parole, on the grounds that he had been denied counsel at the revocation hearing (J.A. 1). On May 3, 1960 the court granted appellee's motion to dismiss the complaint for lack of jurisdiction, without prejudice to refile in the event that relief could not be obtained by habeas corpus, and appeal if necessary, in the Middle District of Pennsylvania (J.A. 9). This appeal was taken.

STATUTE INVOLVED

The pertinent portions of the statute involved in this case provide:

Administrative Procedure Act, § 10, Act of June 11, 1946,
c. 324, 60 Stat. 243, 5 U.S.C. 1009

Judicial review of agency action.

• • • • •

Rights of review.—

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.—

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

SUMMARY OF ARGUMENT

Appellant seeks a review of a parole revocation hearing by way of an action for declaratory judgment in the District of Columbia, urging that under the Administrative Procedure Act such an action may be used as an alternative to habeas corpus in the district where the prisoner is confined. In *Robbins v. Reed*, 106 U.S. App. D.C. 51, 269 F. 2d 242 (C.A. D.C. 1959), this Court permitted review of the proceedings of the Board of Parole by a suit in this district because the federal courts in the district of confinement had ruled that habeas corpus was not available for such review. Appellant, to the contrary, has an effective remedy in habeas corpus in the Middle District of Pennsylvania.

Appellant insists that habeas corpus is not the exclusive form of review under the Administrative Procedure Act, and that declaratory judgment is an "applicable" form. However, it is clear from the decisions of this Court that declaratory relief may not be used to obviate the territorial limitations inherent in habeas corpus. Appellant is in custody and this custodial status determines the form of review by which the order of confinement is to be tested. Habeas corpus is a procedure of limited application, designed particularly for those seeking release from illegal detention. If the detention is illegal, appellant is entitled to immediate release—relief which an action for declaratory judgment has never given and should not here be construed to give.

ARGUMENT

I

Appellant Has a Remedy in the District of His Confinement

In *Robbins v. Reed*, 106 U.S. App. D.C. 51, 269 F. 2d 242 (C.A.D.C. 1959), this Court held (1) that under the parole statute, 18 U.S.C. 4207,¹ an individual who has been arrested pursuant to a parole revocation warrant is entitled to the presence of counsel at his parole revocation hearing,

¹ Act of June 25, 1948, c. 645, 62 Stat. 855.

and (2) that in any parole revocation case arising out of an area where habeas corpus is not available to test the legality of the revocation, the District Court for the District of Columbia is a proper forum in which to seek relief by way of declaratory judgment (106 U.S. App. D.C. at 53). The Court expressly reserved the question of whether the District of Columbia courts would have jurisdiction if the complaint is filed by a prisoner who is incarcerated in a place where the federal courts will entertain a habeas corpus petition on the issue of the procedural adequacy of the revocation hearing. Thus, the Court specifically stated (106 U.S. App. D.C. at 53, 54):

... We need not inquire as to the correctness in general of the view that habeas corpus is the 'applicable' form of action, for a special circumstance takes this case out of the general. . . . We need not decide more than that in the special circumstances of this case the present action in the District Court in this jurisdiction is an available alternative to a habeas corpus proceeding in the Northern District of Georgia.

The initial issue therefore is whether the federal courts in the district of appellant's confinement will entertain a habeas corpus petition to review the Board's action at a revocation hearing. Appellant contends that the District Court in the Middle District of Pennsylvania will not entertain his petition (Br., p. 7, 8); but the obvious fact is that it will.

In *Robbins v. Reed*, *supra*, this Court noted that the Court of Appeals for the Fifth Circuit had held (in *Howell v. Hiatt*, 199 F. 2d 584 (C.A. 5, 1952)), that an attack upon parole revocation proceedings must be made by way of an action in the District of Columbia against the Board of Parole, and not by habeas corpus in the district where the prisoner is confined. Since Robbins was confined at Atlanta Penitentiary, he had no remedy but to bring an action here. In fact, it might be said that he commenced his action in the District of Columbia at the express direction of another court. That, however, is not the situation in the Middle District of Pennsylvania. The federal courts

there are hearing petitions for writs of habeas corpus in parole revocation matters on the merits. See *Washington v. Hagan*, 183 F. Supp. 414 (M.D. Pa. 1960).²

To be sure, in the *Washington* case the court held substantively that there is no right to counsel at revocation hearings, but that obviously does not mean that there is no jurisdiction in that district. On the contrary, an adverse ruling on the merits indicates that the court accepted jurisdiction. Thus, the jurisdictional dilemma which is at the root of the *Robbins* decision is not present here. An adverse decision on the merits calls for an appeal—not for a complaint in another district alleging lack of jurisdiction elsewhere. Cf. *Clark v. Memolo*, 85 U.S. App. D.C. 65, 68, 174 F. 2d 978, 981 (C.A.D.C. 1949).³

Moreover, it appears that this appellant has already sought relief by way of habeas corpus in the Middle District of Pennsylvania, but that, after a hearing, he voluntarily withdrew the petition. *Hurley v. Hagan*, H.C. No. 367. It is apparent, therefore, that appellant does not appear here under the same circumstances as the prisoner in the *Robbins* case, in that there is jurisdiction for his claim in the district where he is confined. To grant the relief he seeks in this proceeding would simply transform the District of Columbia into the primary adjudicator of all federal custody matters regardless of the place of detention and regardless of jurisdiction there.

II

Appellant's Appropriate Remedy is Habeas Corpus

Since the rule of *Robbins* is factually not applicable to the instant case, the problem is whether that rule should

² The substantive issue was also raised, but never reached, in *United States v. Hock*, 275 F. 2d 726 (C.A. 3, 1960). The appellant there had erroneously proceeded under 28 U.S.C. 2255 (correction of sentence).

³ The lower court in the present case seems to have interpreted *Robbins v. Reed* along these same lines. In fact, the order of dismissal was made without prejudice to the refile of the complaint in the event appellant's efforts by habeas corpus and appeal were unsuccessful. (J.A. 9).

be extended to cover situations where the prisoner jurisdictionally has a remedy in the district of his confinement. That problem, in turn, entails examination of the issue of whether the Administrative Procedure Act (5 U.S.C. 1009 *et seq.*) is to be construed to permit one or more alternative forms of review—indifferent to normal jurisdictional requirements and without regard to the availability of a recognized and effective proceeding. It is submitted that, if there is to be efficient and orderly judicial administration, the answer must be in the negative.

The Administrative Procedure Act itself provides that the proper mode of review is any special statutory review provided, or, in the absence or inadequacy thereof, "any *applicable* form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction or habeas corpus) *in any court of competent jurisdiction*" (emphasis added). Section 10 (b), 5 U.S.C. 1009(b). Clearly, the requirement that the action be "applicable" and that it be brought in a "court of competent jurisdiction" indicates that the forms of review were not intended to be unlimited.

An intent should not be imputed to the Congress to create overlapping remedies (with the inherent tendency to inconsistency) as alternatives to a presently existing form of action of notable efficacy. That Congress did not have such an intent is apparent from the legislative history of the Act. The Senate Judiciary Committee reported that section 10(b) gave express statutory recognition to the so-called common law actions as being the appropriate and authorized means of judicial review to be operative when the special statutory forms of review were lacking or insufficient.⁴

⁴ S. Rept. No. 752, Committee on the Judiciary—79th Cong., 1st sess.—pp. 26-27.

* * * (b) *Form and Venue of Action.* The technical form of proceeding for judicial review is any special proceeding provided by statute or, in the absence or inadequacy thereof, any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction. * * *

Traditionally, habeas corpus has been the only form of action by which release from detention can be obtained. Moreover, this Court has frequently held that habeas corpus is available to review decisions of the Board of Parole. *E.g., Fleming v. Tate*, 81 U.S. App. D.C. 205, 156 F. 2d 848 (C.A. D.C. 1946). See also, *Moore v. Reid*, 100 U.S. App. D.C. 373, 246 F. 2d 654 (C.A. D.C. 1957).

Habeas corpus, however, is subject to strict jurisdictional requirements; i.e., the writ will issue only if the petitioner is within the territorial jurisdiction of the court. *Ahrens v. Clark*, 335 U.S. 188 (1948); *McAffee v. Clemmer*, 84 U.S. App. D.C. 57, 171 F. 2d 131 (C.A. D.C. 1948), *cert. den.*, 337 U.S. 932 (1948). It is well settled that the territorial limitations inherent in habeas corpus cannot be obviated by some other form of relief which seeks to accomplish the same purpose. This Court has held that an action for de-

The first sentence of this subsection is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special forms of judicial review are lacking or insufficient. The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action. The expression "special statutory review" means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by statute as the appropriate mode of review. * * *

Representative Walter reporting to the House from the Committee stated (92 Cong. Rec. 5654):

Under this bill the technical form of proceeding for judicial review is, first, any special proceeding which Congress has provided or, in the absence or inadequacy thereof, any relevant form of action such as those for declaratory judgments or injunctions in any court of competent jurisdiction.

* * *

These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adaption of traditional forms of action in cases where Congress has made no contrary provision for judicial review.

claratory judgment may not be so employed. In *Clark v. Memolo, supra*, the Court said (85 U.S. App. D.C. at 67):

It is well settled that the Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly.

See also, *Taylor v. United States Board of Parole*, 90 U.S. App. D.C. 199, 194 F. 2d 882 (C.A. D.C. 1952).

In *Kaminer v. Clark*, 85 U.S. App. DC. 205, 177 F. 2d 51 (C.A. D.C. 1949), *cert. den.*, 338 U.S. 873 (1949), this Court was confronted with an action for declaratory judgment against the Attorney General by an alien in federal custody in New York. The Court said (85 U.S. App. D.C. at 206):

While this suit is for a declaratory judgment, it is substantially similar to an application for writ of habeas corpus, because, in addition to the claim of unconstitutionality, it complains that the appellant's detention without a hearing is unlawful. Habeas corpus would lie only in the Southern District of New York, where appellant was detained on Ellis Island at the time this suit was instituted. . . . *An action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained. . . .* The district court properly dismissed the action, because it lacked jurisdiction. (Emphasis added).

The relief which appellant here seeks is release from custody by a declaration of his rights by the courts of this district. A holding giving him the right to apply for such relief would be in direct conflict with the decisions of this Court in the above cases and would result in needless conflict and uncertainty among courts in the various circuits.

Appellant's objective in by-passing the District Court for the Middle District of Pennsylvania is obvious. The basis for the allegation of unlawful detention is the denial

of counsel at appellant's revocation hearing. This Court has held, in *Robbins v. Reed*, *supra*, that the right to counsel at the hearing cannot be denied, but the District Court where appellant is incarcerated has held to the contrary.⁵ Appellant should not be permitted, under the authority of the Administrative Procedure Act, to shop around for a forum which will be sympathetic to the merits of his case. To allow this would violate generally accepted theories of jurisdictional requirements. See *Clark v. Memolo*, *infra*, p. 11.

Appellant contends that his position is supported by certain deportation and exclusion cases under the Immigration and Nationality Act, citing *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), and *Brownell v. Tom We Shung*, 352 U.S. 180 (1956), (Br., p. 7). Actually, these cases support our contention that the only applicable form of relief here is habeas corpus. In the cited alien cases the plaintiffs were not in custody, and it is apparent that this was the crucial jurisdictional factor. There was no indication in either *Pedreiro* or *Tom We Shung* that any form of review other than habeas corpus would have been appropriate had the complaining party been in custody. That the form of action is to be determined by the custodial status is clearly expressed in *Tom We Shung* (352 U.S. at 186):

It may be that habeas corpus is a far more expeditious remedy than that of declaratory judgment, as the experience of Shung may indicate. But that fact [time element] may be weighed by the alien against the necessity of arrest and detention after which [the balancing of these two factors] he may make his choice of the form of action he wishes to use in challenging his exclusion (brackets added).

⁵ The Government realizes that *Robbins v. Reed* establishes the law for this Circuit with respect to representation by counsel at revocation proceedings, and for this reason has not discussed the issue in its brief. However, we reserve the right to take a contrary position in litigation in other courts.

Along the same lines, the Court of Appeals in *Pedreiro* said (213 F. 2d 768, 769):

The traditional remedy of habeas corpus as a means of reviewing the validity of an order of deportation is plainly inapplicable, as petitioner is not in custody, and one cannot blame him for unwillingness to gamble with his liberty which may not be readily regained.

To the same effect is *Kaminer v. Clark*, *supra*, the holding of which was reaffirmed in *Kristensen v. McGrath*, 86 U.S. App. D.C. 48, 179 F. 2d 796 (C.A.D.C. 1949), *aff'd.*, 340 U.S. 162 (1950). In *Kristensen* this Court held that a declaratory judgment and injunction proceeding would lie in the District of Columbia to test the validity of a deportation order outstanding against a naturalized citizen who was not in custody. The Court was careful to indicate, however, that the decision did not conflict with the *Kaminer* case, stating, with respect to the earlier decision, that (86 U.S. App. D.C. at 52):

We ruled that 'an action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained'. . . . Here, declaratory relief is appropriate and since appellant is not in custody in another district the *Kaminer* rule is necessarily inapplicable.

The rule established by these decisions is clearly that when the complaining party is in custody, the remedy of habeas corpus—with its jurisdictional limitations—is to be maintained as against other forms of action. The decisions also reflect the inappropriateness of declaratory judgment in custody cases. In *Kristensen* the Court indicated that such a remedy was designed to be used to decide cases prior to the time that the law's coercive machinery is

brought into play, and in *Clark v. Memolo, supra*, this Court said (85 U.S. App. D.C. at 68):

The Declaratory Judgment Act was designed to provide a remedy in a case or controversy while there is still opportunity for peaceable judicial settlement. It was the primary purpose of the Act to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated.

This Court, in *Memolo*, foresaw the effect of a contrary holding when it stated (85 U.S. App. D.C. at 68):

To permit every person convicted in any United States District Court who claimed that his sentence was void because of a violation of his constitutional rights, such as double jeopardy, appointment of counsel, and the like, to maintain an action in the District of Columbia to set such sentence aside, would create a conflict of jurisdictions which was not contemplated or intended by the Declaratory Judgments Act. [Citing cases]. *The action for declaratory judgment is not suitable and does not lie in the District of Columbia in such cases as a substitute for a motion to vacate or to correct the sentence in the court where it was imposed, or as a substitute for habeas corpus in the district where the unlawful detention occurs, or as a substitute for a new trial or appeal. Unless so restricted there would be no end to that kind of litigation. To hold otherwise would mean that all such actions for declaratory judgment could be brought only in the District of Columbia because this is the only district in which the Attorney General [or the Board of Parole] may be sued. Such procedure would not only hamper the enforcement of the criminal laws, but would be entirely unnecessary, since the existing remedies are entirely adequate to protect the rights of the prisoner. (Brackets and emphasis added).*

If the relief which appellant seeks is granted in this case, the fears of the Court expressed in *Memolo* will have a painful realization. The District Court for the District of Columbia will become a court of last resort whenever an unfavorable decision on the merits seems likely elsewhere. In addition to the conflicts of jurisdiction which will inevitably ensue, a large share of the numerous legal actions commenced by prisoners will be concentrated in this district so as to create a crushing burden on courts with already crowded calendars. All of this will be wholly without cause. There is no suggestion that the prisoner's day in court will be denied to him elsewhere. Habeas corpus, an adequate and speedy remedy, expressly tailored to obtain the relief sought, is available to the appellant at any time that he cares to make application therefor.

CONCLUSION

Accordingly, it is respectfully submitted that the decision of the District Court should be affirmed.

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